

SEP 28 2005**NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS****FOR THE NINTH CIRCUIT****UNITED STATES OF AMERICA,****Plaintiff - Appellee,****v.****CLIFFORD BATES,****Defendant - Appellant.****No. 04-50589****D.C. No. CR-04-01167-1-WQH****MEMORANDUM***

**Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding**

**Argued and Submitted September 13, 2005
Pasadena, California**

Before: FARRIS, FERNANDEZ, and BYBEE, Circuit Judges.

Clifford Johnny Bates appeals from his jury conviction and sentence for importing a controlled substance in violation of 21 U.S.C. §§ 952 and 960 and possessing a controlled substance with intent to distribute in violation of 21 U.S.C. § 841. He argues that his conviction was based on the admission of “other crimes”

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evidence. He also complains of the delayed disclosure of an investigative report during trial and alleges error in his sentence. We affirm in part and remand for a limited purpose.

Bates challenges the admission of testimony about his prior involvement in smuggling contraband across the border. He argues that such testimony was introduced solely to prove his propensity to smuggle, a purpose forbidden by Rule 404(b). We review *de novo* whether the evidence falls within the scope of “other crimes” under Rule 404(b), but we review the decision to admit evidence for abuse of discretion. *United States v. Jackson*, 84 F.3d 1154, 1158-59 (9th Cir. 1996).

Under Rule 404(b), evidence of a person’s other crimes, wrongs, or acts may not be admitted if it is intended solely to prove that the person’s conduct during the charged incident is in conformity with his conduct on a different occasion. Fed. R. Evid. 404(b). But other act evidence is admissible for other purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. *Id.* The Rule also requires that the prosecution “provide reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at trial.” *Id.* “Failure to provide notice or obtain an excuse from the district court, renders the other acts evidence inadmissible, whether the evidence is used in the prosecution’s case-in-chief or for impeachment.” *United*

States v. Vega, 188 F.3d 1150, 1153 (9th Cir. 1999).

Generally, evidence of other acts need not meet the requirements of Rule 404(b) when it is inextricably intertwined with the evidence concerning the crime with which the defendant is charged. *United States v. Matthews*, 240 F.3d 806, 817 (9th Cir. 2001). Evidence of other acts is inextricably intertwined when (1) it constitutes a part of the transaction that serves as the basis for the criminal charge, or (2) it helps the prosecutor “offer a coherent and comprehensible story regarding the commission of the crime.” *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012-13 (9th Cir. 1995).

Agent Fejeran testified that Bates admitted that on each of the two days prior to his arrest he had driven the same van, for the same friend, for the same amount of money, to the same destination, and returned to the same origin via the same mode of travel. Agent Fejeran also testified to Bates’ eventual admission that he suspected he was smuggling narcotics into the U.S. on the day of his arrest. These admissions explain the events surrounding the commission of the charged crime as well as the circumstances under which Bates’ confession to the illegal importation was obtained and are, therefore, inextricably intertwined with the charged crimes. Moreover, Bates’ knowledge was an element of the crime charged and a contested

issue. His post-arrest admissions do not run afoul of Rule 404(b). Rather, they illustrate that he knew he was smuggling drugs on the occasion in question.¹

Finally, Agent Fejeran testified to Bates' admission to transporting loads of drugs across the border more than sixty times and his contemporaneous offer to provide information about drug smugglers. The fact that Bates knowingly took drugs across the border on earlier occasions also leads to the legitimate inference that he was not an "innocent dupe" in the instant crime. *United States v. Bibo-Rodriguez*, 922 F.2d 1398, 1400 (9th Cir. 1991). And although Bates provided no time frame for his involvement as a frequent passenger in drug-laden vehicles, he offered to provide current information about an ongoing smuggling operation. Thus, "it is reasonable to conclude that he was referring to a period of time which included the charged offense." *Id.* at 1401.

Bates also claims that the Government violated *Brady v. Maryland* by failing to disclose Agent Fejeran's investigative report prior to trial. 373 U.S. 83 (1963). We review *de novo* challenges to a conviction based on *Brady* violations. *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988).

¹ Alternatively, Bates' post-arrest statements were likely admissible as admissions against self-interest. *See* Fed. R. Evid. 801(d)(2)(A).

Assuming, without deciding, that Bates was entitled to discover Agent Fejeran's investigative report, no due process violation occurred. The Government turned over the report at a time when disclosure was still of substantial value to the accused. *See id.* at 1403. Defense counsel used the report to enter a stipulation of fact into evidence and to cross-examine Agent Fejeran, thereby curing any prejudice caused by the delayed disclosure. *Id.*

After Bates was sentenced, the Supreme Court held that the Sentencing Guidelines are advisory, not mandatory. *United States v. Booker*, 125 S. Ct. 738, 764-67 (2005). Since nothing in the record indicates whether the district court would have imposed the same sentence had it known the Guidelines were non-mandatory, we remand the sentence in accordance with *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005). *See United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005) (concluding “that defendants are entitled to limited remands in *all* pending direct criminal appeals involving unpreserved *Booker* error, whether constitutional or nonconstitutional.”) (emphasis in original).

AFFIRMED in part and REMANDED for a limited purpose.